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No. 90-900

IN THE

Supreme Court of the United States

October Term, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

against

THE CITY OF NEW YORK and THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Brief of the Committee to Oppose the Sale of St. Bartholomew's Church Inc., J. Sinclair Armstrong, Robert E. Morris, Jr., Doris Capp Stass, George H. Weiler, III, Madeleine Calder, Beatrice Lotz, Bromwell Ault, Jr., Neal Goldman and Charlotte Pierce Armstrong, as *Amici Curiae* in Support of Respondents

GERALD D. FISCHER
Attorney for The Committee to Oppose the Sale of St. Bartholomew's Church Inc., et al, Amici Curiae
Suite 1501
275 Madison Avenue
New York, NY 10016
(212) 689-1131

THE REPORTER COMPANY, INC., 30 Vesey St, New York, NY 10007—1991
NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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THE INTEREST OF THE AMICI CURIAE

This brief amici curiae is submitted in opposition to the petition for a writ of certiorari filed by the petitioner church ("the Church") and in support of respondents the City of New York and the Landmarks Preservation Commission ("the

Commission").[1]

The individual amici curiae herein are long-standing members of the Church and a not-for-profit corporation which they helped form in 1980 to oppose the Church's plans to destroy its landmarked property and to construct, in a joint venture with a developer, a commercial high-rise office tower on its site. (The amici curiae will hereafter be collectively referred to as "the Committee")

The amici curiae fully participated in the proceedings in the District Court, in the Court of Appeals, as well as in the administrative proceedings before the Commission, upon whose record this case was tried.

To assure a full record in the District Court, the Committee was permitted, at the outset of the action, to participate as

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[1]/Petitioner and respondents have consented, by stipulation filed herewith, to the filing of this brief.

amici curiae in the proceedings. (A-187)[2] As the District Court stated, the Committee was "allowed . . . to intervene as amicus curiae" because of its "interest in seeing to it that I get a full record". (District Court Transcript of November 20, 1987, page 131). The District Court added (Id. at pages 27-28):

> I had a feeling that I would not get all the facts I needed to resolve this issue intelligently from the parties. That being the case, I ought to let someone else give them to me, either as amicus curiae or as intervenors.

The trial was conducted, over the Committee's objections, on the Commission's non-judicial administrative record.[3] The

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[2] References to "(A. ____)" are to the appendix in the Court of Appeals. The appendix in the District Court is cited by volume and page (e.g. 10/3271 is volume 10 page 3271).

[3] The Committee urged that a trial de novo was required to resolve the constitutional issues raised by the Church. The rejection of the Committee's motion to intervene on the

Committee had participated in the Commission proceedings, to the limited extent permitted, and presented evidence to rebut the Church's extensive misrepresentations of fact. With the intimate knowledge of the affairs of the Church possessed by its members who were long-time parishioners, the Committee contested the credibility of the Church's case. As one reporter wrote:

> But the most serious damage [to the hardship application] was inflicted by Armstrong's Committee to Oppose the Sale of St. Bartholomew's Church. The members of the Committee knew the Church inside and out. They knew where the weak points in the Church's arguments were. Over several months, the relationship of the Committee to

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(Footnote continued from previous page)

side of defendants to force a trial de novo was appealed to and affirmed by the Court of Appeals for the Second Circuit. The Committee has now filed a separate petition for certiorari. That petition urges that if the Church's petition is granted, the Committee's petition should also be granted so that the Court may, in the event of a reversal, remand the case for a trial de novo.

> the hardship application was that of a German Shepard to a stray sock. When the hearing process was over, there was hardly a thread of the application that was still intact.
>
> (Manhattan Inc., July 1986 Issue, page 24.)

The Committee now submits this amicus brief in opposition to the Church's petition for certiorari (a) in order to call to the attention of the Court the misstatements of fact set forth by the Church and (b) to respond to the Church's attempt, under the guise of the Free Exercise clause, to have this Court consider exemption of religious organizations from landmark regulations so that such organizations may pursue commercial land development under different rules than apply to others.

SUMMARY OF ARGUMENT

Petitioner Misstates The Facts

This case is not about religion. It is about a church's efforts, in partnership

with a commercial real estate developer, to destroy its landmark property and to develop its site to its highest commercial value. Under the guise of religious freedom, the Church seeks special treatment so that it and its developer may be relieved of a land-use regulation which applies to all.

To accomplish its goals, the Church attempted, but failed, to prove that maintenance of the landmark was a hardship and that the refusal of the Commission to remove the burden of the landmark designation interfered with its freedom of religion and constituted a taking of its property. The District Court carefully analyzed the record and concluded that the Church "failed to prove that its community house was inadequate for the purposes to which it is devoted"; and that it was unable to pay for necessary repairs and rehabilitation. (A. 1159) The Court of Appeals affirmed those factual conclusions as not

clearly erroneous.

Having failed in its proof below, the Church now misrepresents the record in an attempt to frame legal issues which will convince this Court to grant its petition for certiorari. It makes alleged factual statements which have no basis in the record as well as others which were never proven to the satisfaction of the District Court.

The Church now falsely presents itself as an embattled church, gravely burdened by a landmark designation which has been thrust upon it and which threatens its very survival. It omits to tell this Court that it voiced no objection to the designation of its property as a landmark in 1967; that for 16 years thereafter it made no objection to the designation; and that it first protested its landmark designation after it signed a contract with a real estate developer in 1983. In that contract, the developer agreed

to construct a commercial high-rise office tower on the site in exchange for a long-term lease. The Church contractually agreed, for their mutual benefit, to seek removal of its landmark designation and to litigate the issue, if necessary, up to this Court.

Contrary to the findings of fact made against it in the trial court and without basis in the record, the Church boldly states (a) that its "once-thriving" congregation is "now diminished", resulting in a "concomitant weakening of its financial viability" (the Church's petition, p. 22); (b) that as a result, it is "left with buildings that are ill-suited to their needs and costly to maintain and repair" Id. at p. 7); and (c) that it should be permitted to demolish its landmarked property and construct an office tower in its place because only such commercial development "would generate income" which is "essential . . . . to assure its

survival", as well as "to repair and rehabilitate the Church building" and "to support its mission". (Id. at p. 3)

The record does not support the Church's present picture of itself as a "once-thriving" "now-diminished" congregation, struggling to survive. Indeed, it argued the contrary in the District Court where it contended that because of its expanding activities and programs, it required more space than its present buildings provide. The District Court disagreed. Having failed with that approach, it should not now be permitted to reconstruct the facts to enhance its petition for certiorari.

The overwhelming weight of the record facts as found by the trial court demonstrates that the Church's landmark designation creates no undue burden upon it. The Church's claims of hardship below and on this petition are nothing more than a pretext to permit it and

its real estate developer to commercially develop its property to its highest value. The record facts show that the Church is a prosperous one, with an enviable endowment of some $14 million, annual revenues of over $3 million, full-well able to maintain its landmark structures which are more than adequate to house its needs and uses. Its unfounded claims of hardship and of infringement of its religious freedom are nothing more than a pretext designed to advance its joint venture to commercially develop its property.

Petitioner's Extreme View of the Law

The Church seeks to advance its commercial goals under an extreme view of the Free Exercise Clause - that religious organizations should be singled out for special treatment under the Landmarks Law. The across-the-board, automatic exemption which the Church seeks from the facially neutral

landmark statute would be an unconstitutional establishment of religion. The Church would have this Court consider placing religious entities in a position of advantage vis-a-vis non-religious owners of landmarked property by exempting them (the religious owners) from the strictures of the Landmarks Law. This is forbidden by the Establishment Clause. This Court should not grant certiorari to consider the Church's extreme position.

The Free Exercise Clause was designed to protect against direct burdens on religious practice, not the kind of remote and indirect burden the Church claims exists here. The Free Exercise Clause was not designed to proscribe neutral regulation of secular activity like the Landmarks Law.

The Landmarks Law does not burden any aspect of the Church's activity in a constitutionally recognizable way. Furthermore, to the extent that there are individual cases of

genuine hardship constituting a justifiable claim for relief, the hardship provisions of the Landmarks Law are available.

Additionally, the Landmarks Law does not impermissibly entangle the Commission and religious entities. The Commission does not in any way involve itself in interpreting a religious group's theology, defining its mission, or establishing its priorities. The Commission makes purely secular judgments that are well within its competence. This Court has long upheld agency practices of the sort involved here against entanglement challenges.

Lastly, the District Court found that there was no unconstitutional taking of the Church's property, ruling that the Church had failed to establish that denial of permission to destroy its landmark and to construct a 47-story commercial office tower interfered in any manner with the primary use of the pro-

perty over the past 60 years as a place of worship and as a center for its related activities.

In sum, certiorari should not be granted to consider the extreme interpretation of the Free Exercise Clause and the taking Clause which the Church expouses.

POINT I

IN AN ATTEMPT TO FRAME CONSTITUTIONAL ISSUES FOR REVIEW, THE CHURCH MISSTATES THE FACTS AND MAKES A FACTUAL PRESENTATION WHICH IS UNSUPPORTED BY THE RECORD AND CONTRARY TO THE FACTUAL CONCLUSIONS REACHED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS

A. The Church Did Not Object to The Landmark Designation In 1967 of Its Two Buildings and Site And Raised No Objections Until 1983 When It Signed A Contract with a Developer Conditioned Upon Removal of The Landmark Designation

In 1966, the Commission proposed the designation as a landmark "of St. Bartholomew's Church and Community House and the Proposed Designation of the related landmark

Site." The Church did not oppose the landmark designation. As a result, in 1967, the Commission designated both buildings as landmarks and the entire property as their landmark site.

In its petition the Church ignores the fact that it did not oppose the 1967 landmark designation and, until 1983, accepted the responsibilities of a landmark owner. Its position changed in 1983 when the real estate developer with whom it had contracted required it to obtain permission from the Commission to demolish its landmark and to construct an office tower in its place. Only then did it claim that the maintenance of the landmark constituted a hardship.

B. The Architectural and Aesthetic Significance of the Community House

The Church attempts to minimize the significance of the Community House by incor-

rectly stating that when the property was landmarked, the Commission "did not ascribe any distinctive architectural features to the community house." (Petition, page 4) To the contrary, the Commission's designation report found (A 596, emphasis added):

> St. Bartholomew's Church and Community House are handsome modern versions of Romanesque and Byzantine architecture, that the unusual use of polychrome in their building materials makes them outstanding in New York, that their decorations include significant works of art and that the Church and the Community House are outstanding examples of this style of architecture in the United States.
>
> [The Community House] harmonizes with the Church through the use of the same warm-colored building materials, the continuation of the limestone band courses from the Church and chapel, and the interspersing of decorative details similar in character and scale to those used in construction of the main house of worship.

Noted architectural authority Ada Louise Huxtable commenting upon the landmark stated (New York Times, October 19, 1980):

> The architecture of St. Bartholomew's consists of a church building and a community house that form an integrated L-shaped whole. Functionally, the structures are separate, but, visually, all the parts are unified.
>
> That the beauty of St. Bartholomew's block contributes to the spiritual welfare of the city and all of its people is not part of the reckoning . . . Only in a culture when commercial values have vanquished spiritual values would such a church and its setting not be considered a legacy beyond price from the past to the present.

In sum, the Church ignores the record facts when it argues that the Church Building is the only significant architectural feature of the landmark property.

C. As Required By Its Contract With Its Developer The Church (i) Sought Permission To Demolish Its Landmark Community House, Destroy the Landmark Site and Construct A Commercial High Rise Office Tower and (ii) Has Prosecuted Its Claims to The Supreme Court

In December 1983 the Church contracted to enter into a lease with a commercial developer to build a 59 story office tower.

The contract required the Church to obtain permission from the Commission to demolish the Community House. Failing that, the Church was required to institute "Court actions and appeals, to the extent permitted, up to and including the United States Supreme Court." (11/3782-83)[4]

In December 1983, in accordance with its contractual obligations to its developer, the Church dutifully applied to the Commission for a Certificate of Appropriateness to re-

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[4]Two years earlier, in 1981 the same developer had agreed to immediately sign a lease with the Church and to pay $1,000,000 upon signing, with the funds to be used by the Church for the landmark fight. The Church thereafter reneged and refused to sign the lease. Instead, this allegedly hard-up Church, renegotiated the deal, signed a Contract to Lease in 1983, gave up the right to receive $1,000,000 up front from the developer and agreed to pay substantially all of the landmark expenses beyond some $500,000 to be advanced by the developer. (13/4786) No hardship prevented the Church from delaying its deal for two years to renegotiate and from giving up the right to obtain $1,000,000 from the developer.

place the Community House with a 59 story office tower.

D. The False Claims Of Financial Distress

In its petition the Church tells this Court that income to be generated from its real estate is "essential" "to assure its survival." (Petition, p. 3)

This same alarm has been sounded since the early 1980's when the Church first began falsely predicting "insolvency" as a ploy to justify destruction of its landmark.

Although totally inappropriate in an application for a certificate of appropriateness seeking permission to alter the landmark, the Church, of its own accord, interjected its finances into its first two applications before the Commission. It falsely claimed in 1983 that if it were not permitted to destroy its landmark "the Church will become insolvent and forced for lack of finances to close its

doors and discontinue its operations in the near future. This is an imminent possibility". "Without major additional financial resources the Church will face insolvency within the next several years." (Memorandum of December 15, 1983 in Support of the Application of the Church for Certificate of Appropriateness, pages 7, 28.)[5/]

To buttress its "dooms day" scenario, the Church presented false projections, projecting cumulative deficits of $14,980,000 by 1990 and $19,174,000 by 1991[6/] (Id at 28-29)

5/By stipulation of the parties, all materials relating to the Church's first application for a certificate of appropriateness are included in the trial record but were not included in the Appendix submitted to the Court. A complete list of the materials relating to the first application is set forth at the end of the Table of Contents bound into the first volume of the Appendix.

6/These outrageous projections were later abandoned when the Church filed its third application (i.e. its hardship application)

It falsely claimed that all but $500,000 of its $14 million endowment was unrestricted, when in fact at least $6,400,000 was unrestricted. (12/4228, 4233-4234); that due to lack of finances it was compelled to close the sanctuary six days a week in order to save $45,000 per year; and that it could not pay its 1984 share of its diocesan assessment of $142,000. (12/4286- 4287, 4297)

When the Church's 1984 financials were ultimately filed by it in connection with its hardship application, they reflected annual revenues of $3,825,805 (10/3713) and marketable securities of $12,560,099 (16/5487). It was thus patently clear that the Church could well afford the $45,000 required to keep its house of worship open seven days a week, if it wished to do so, and that its closing was part of its efforts to

"feign" a financial hardship.[7/] The 1984 financial statements also revealed that, contrary to its statements, the Church had in fact paid its 1984 diocesan assessment of $139,476. (10/3725)

That the Church was prepared to say and do whatever was necessary to achieve its goals and to accommodate its joint venture with its developer is obvious. Even on this petition, and notwithstanding the record facts to the contrary, the Church continues to argue that the income from commercial development of its property is "essential . . . to assure its survival." (Church's petition, p.3)

[7/]The Church's December 31, 1984 financial statements show $2,733,244 support and revenue plus $1,092,561 of contributions, bequests, investment income and gains on investment transactions. (10/3713) Out of these revenues of $3,825,805, the Church incredibly argued that although it was able to find $232,019 in 1984 to spend on "Development expenses", it could not find the $45,000 needed to keep its house of worship open during the week. (10/3713)

The District Court noted the size of the substantial endowment with which the Church is blessed, its substantial annual income and the fact that it has operated, over a 10 year period, at a virtual break-even level (even while spending $1.6 million on so-called "development expenses"). (A 1154-57) The trial court found that the Church's very substantial worldly assets are ample to pay for the normal maintenance and repair required of its buildings. Surely, there can be no question on the basis of this record of the Church's "survival".

E. The Church Failed To Prove That Its Community House Was Inadequate For The Purposes To Which It Was Devoted, And That It Could Not Afford The Required Repairs

The factual picture which the Church paints in its petition - of a "once-thriving" and "now diminished" congregation burdened with "ill-suited" buildings, which it cannot

afford to maintain - is contrary to the position which it espoused below. At the trial level it did not contend that its activities and use of its buildings were in any way "diminished" by a declining congregation. To the contrary, it contended that the Community House which it has used for some 60 years was inadequate to accommodate the variety of ever-expanding and bustling activities that compete for the space. As the District Court summarized (A 1141):

> Plaintiff contends that the evidence shows that: the usable space available in the community house is insufficient to accommodate the variety of activities that compete for the space; that it wishes to expand its existing programs but cannot do so given those space constraints; that it is forced to conduct activities in spaces that are inappropriate for those activities; and that renovation of the interior of the community house is impractical and not feasible."

The District Court rejected the Church's contentions (A 1159):

> "[T]he Court finds, as a matter of fact, that the Church has failed to prove that its community house is inadequate for the purposes to which it is devoted, that the Church has failed to prove that it is incapable of carrying out its charitable purpose within those facilities, and that although those facilities do require some repair and rehabilitation, the Church has failed to show that it cannot afford to pay for those necessary repairs and rehabilitation."

The Court of Appeals affirmed and held that it was not clearly erroneous for the District Court to conclude "that the Church failed to prove its Community House was fundamentally unsuitable for its current use and that the cost of repair and rehabilitation is beyond the financial means of the Church."

On this petition, the Church should not be permitted to deviate from, and should be bound by, the factual findings against it.

POINT II

CERTIORARI SHOULD NOT BE GRANTED TO CONSIDER AN EXEMPTION FROM THE LANDMARKS LAW FOR ALL RELIGIOUS ORGANIZATIONS WHICH EXEMPTION WOULD VIOLATE THE ESTABLISHMENT CLAUSE

The Church advances the extreme proposition that the First Amendment requires exemption of all religious organizations from the Landmarks Law - that the First Amendment requires the City to permit religious entities to seize the profits of what would be, for other property owners, illegal real estate development ventures. Such aggressive assistance to religious institutions is flatly forbidden by the Establishment Clause.

The Landmarks Law is a facially neutral statute. Wisconsin v. Yoder, 406 U.S. 205 (1972), noted "the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." Id. at 220-21.

Government may not go out of its way

to assist religion. It may accommodate religion only to restore it to a position of parity with their secular counterparts. It may not place them in a position of advantage.8/

Governmental action may not advance religion. Lemon v. Kurtzman, 403 U.S. 602 (1971) or have the effect of "endorsing" religion. See County of Allegheny v. ACLU, 109 S. Ct. 3086, 3100 (1989). An exemption of all properties owned by religious organizations from the Landmarks Law could not withstand this test. Petitioner would accord religious organizations an unfair competitive advantage over secular property owners in New

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8/ As Justice Stevens has said, the Free Exercise Clause is "a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect." United States v. Lee, 455 U.S. 252 n.3 (1982) (Stevens, J., concurring in the judgment). See also Sherbert v. Verner, 374 U.S. 398, 410 (1963).

York's real estate market, which would have the effect of advancing religion.

The Church is not arguing that it is too small to accommodate all those who desire to worship there, or that all the space in the proposed sky-scraper to be constructed on the site of the Community House is needed to house the homeless or in some other way directly serve the charitable and religious purposes of the Church. Rather, the argument is that the Church must be allowed to build this commercial office tower - so that the income to be generated from the project may inure to the benefit of the Church. Freedom of religion is implicated only, if at all, in the sense that the profits generated by the commercial venture might be used to finance activities, some of which arguably could be connected to the Church's teachings on charity.

As Judge J. Skelly Wright put it in rejecting, as violative of the Establishment

Clause, a religious institution's claim that it was exempt from FCC regulation:

> [S]ponsorship is what this exemption accomplishes. It is a sure formula for concentrating and vastly extending the worldly influences of those religious sects having the wealth and inclination to buy up pieces of the secular economy.

King's Garden, Inc. v. Federal Communications Commission, 498 F.2d 51 (D.C. Cir. 1974). He concluded that "creating this gross distinction between the rules facing religious and non-religious entrepreneurs" would be "on collision course with the Establishment Clause." Id. 9/ To exempt religious entities (or this religious entity's real estate

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9/See also United States v. Lee, 455 U.S. 252, 261 (1982):

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

venture) from the Landmarks Law would "except" religious institutions in general (and this church in particular) "from a general obligation of citizenship" and would thereby violate the Establishment Clause. Wisconsin v. Yoder, 406 U.S. at 220-21.

The Church argues for a narrow exemption available only to religious organizations (and not to not-for-profit corporations in general). The express purpose of the exemption is to remove restraints on development of landmark properties owned or leased by religious organizations so that they might maximize the profits they generate from their property.

The direct consequence of exempting property owned by religious institutions from landmark designation and the attendant limitations is improvement of the Church's financial status. Thus, the purpose and effect of the exemption are to convey an immediate,

direct benefit to churches that will facilitate the expansion of their religious activities in violation of the Establishment Clause.

POINT III

THE FREE EXERCISE CLAUSE DOES NOT REQUIRE AN EXEMPTION FROM THE LANDMARKS LAW FOR RELIGIOUS ORGANIZATIONS AND CERTIORARI SHOULD NOT BE GRANTED TO CONSIDER THE ISSUE

A landmarking law that treats all property owners the same cannot be said to "prohibit" the free exercise of religion.

Church property, like most private property, is subject to a variety of regulations regarding its use and development. In Lemon v. Kurtzman, 403 U.S. 602 (1971), ("[f]ire inspections [and] building and zoning regulations," were listed as "examples of necessary and permissible contacts" between government and religion. Id at 614. See also

Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953, 1963 (1985).

Free Exercise challenges to land-use regulations like the Landmarks Law often are assessed under the standard announced in Braunfeld v. Brown, 366 U.S. 599, 607 (1961):

> [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goal, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

This test asks three questions. Is the preservation of landmarks a valid secular purpose? In Penn Central Transportation Co. v. New York City, 438 U.S. 104, 108-09, 134 (1978), this Court said it was. Is the burden (if any) placed on religious organizations indirect? This case is not one where action consistent with dictates of faith is criminalized, see Wisconsin v. Yoder, 406 U.S. 205

(1972) or otherwise penalized, see Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981). Though some of the Bishop's aspirations may be unsated, the City is not threatening the Church, or any of its members, with criminal sanction or denial of vital subsidies. Not even the Church is claiming that the Landmarks Law imposes a direct penalty on the Church as such. Can the state accomplish its purpose by means which do not impose the burden? Obviously not. The landmarks at issue can be saved only if they are not destroyed.

The application of the Braunfeld test, we submit, dooms the Church's claim.

In Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953 (1985), this Court stated that "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum,

inclusion in the program actually burdens the claimant's freedom to exercise religious rights." Id at 1963 (emphasis added). See also United States v. Lee, 455 U.S. 252, 256-57 (1982); Thomas v. Review Board, 450 U.S. 707, 717-18 (1981).

Of course, a true burden must be shown. See, e.g. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

The Landmarks Law does not burden the Church's religious activity. The Church exercises its religion, burdened only by the obligations that face every owner of a landmark. It is not compelled to act contrary to religious beliefs or to abandon any religious belief.

The Church is not theologically compelled to build a high-rise office tower. Construction of the office tower is not a religious act. The Church argues only that

the construction of the building will, hopefully, generate profits which the Church ostensibly will use to "support its mission."

The City has every right to control the secular commercial activity of a church. No Church has a constitutional right to a special competitive advantage over similarly situated non-religious commercial actors; no church has a constitutional right to maximum profits in commercial ventures; and no church should be permitted to invoke a religious freedom argument designed solely to advance a commercial joint venture. Stripped of its rhetoric, the Church's presentation does not reveal a burden on religious practice; it reveals that the Church is not making as much money as it would if it had an advantage no other landmark property owner has - the unbridled right to develop. Whatever burden it feels is not a burden for purposes of Free Exercise Clause analysis. Jimmy Swaggart

Ministries v. Board of Equalization, 110 S. Ct. 688, 690 (1990); Hernandez v. Commissioner, 109 S. Ct. 2136, 2149 (1989). As this Court said in United States v. Lee, 455 U.S. 252 (1982):

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id at 261. See also Braunfeld v. Brown, 366 U.S. 599, 605 (1971).

The Landmarks Law provides relief for nonprofit landmark owners in those cases where landmark status truly frustrates the specific purposes for which the building is used. N.Y. City Admin. Code, chap. 8, Sec. 207-8.0(a)(2), recodified as N.Y. City Admin. Code, chap. 3, sec. 25-309(a)(2). The New York courts have fashioned a remedy to religious owners who, unlike petitioner, because of

genuine hardship, must alter or demolish their landmark. Under this judicially created test, whenever prohibiting a religious organization from altering or demolishing its structure would "prevent or seriously interfere with the carrying out of [its] charitable purpose," permission to alter or demolish must be granted. Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 522, 496 N.Y.S.2d 183, 191, 505 N.Y.S.2d 24, 32, cert. denied, 107 S. Ct. 574 (1986); Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974); The Commission has exempted those religious institutions who have made the required demonstration. See, e.g., 1025 Fifth Avenue v. Marymount School, 123 Misc. 2d 756, 475 N.Y.S.2d 182 (Sup. Ct. 1983).

In sum, and for the the above reasons, the Church's extreme Free Exercise claim does not warrant granting certiorari.

POINT IV

THE LANDMARKS LAW DOES NOT IMPERMISSIBLY ENTANGLE THE COMMISSION AND THE CHURCH

The Landmarks Law does not impinge upon the Church's constitutionally protected interest in managing its own affairs and in Church autonomy.

The Commission does not <u>in any way</u> involve itself in interpreting a Church's theology, defining its mission, or engaging in its day to day affairs. The Commission determines only whether the Church's present space is adequate for stated needs.

Here, the Church claimed that its community house had insufficient space to service the programs it feels bound to run and

claimed that a new building must be constructed to provide adequate space. The Commission evaluated whether the group's existing space is adequate for the denominated programs and whether the proposed space is better. Such a determination is well within the Commission's competence, and does not "entangle" the Commission in the religious affairs of the Church.

The Commission does not presume to tell The Church how it should manage its affairs. The Commission merely regulates a structure that happens to belong to a church and which also must comply with building regulations, fire codes, and zoning laws.

The Commission comes into contact with the Church at rare, clearly specified moments. The designation decision, for example, occurred once, in 1967. Once the decision has been made, no further contact between the agency and the church was necessary. The Church initiated further contact

with the Commission by requesting permission to destroy or alter the landmark. In connection therewith the Commission confined its inquiry to purely secular matters.

This Court has found no entanglement and sanctioned governmental regulation of the secular activities of religious entities, as well as the identification of activities as secular.' See, e.g. Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S.Ct. 1953 (1985; Tilton v. Richardson, 403 U.S. 672, 679 (1971); Hunt v. McNair, 413 U.S. 734, 737 (1973); Wolman v. Walter, 433 U.S. 299, 240 (1977).

Far more intrusive regulation of religious entities than the Landmarks Law have been approved. See, e.g. Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953 (1985) Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688, 697-99

(1990); Hernandez v. Commissioner, 109 S. Ct. 2136, 2147 (1989); Bowen v. Kendrick, 487 U.S. 589 (1988).

POINT V

THE LANDMARKS LAW DOES NOT EFFECT AN UNCONSTITUTIONAL TAKING OF THE CHURCH'S PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT AND CERTIORARI SHOULD BE DENIED

A. The Landmarks Law On Its Face Does Not Violate The Taking Clause Of The Fifth Amendment

In light of this Court's decision in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) petitioner cannot seriously contend that the Landmarks Law, on its face, violates the Fifth Amendment Taking Clause.

B. The Landmarks Law As Applied to St. Bartholomew's Does Not Violate The Taking Clause of The Fifth Amendment

Penn Central set forth the standards used in determining when a "taking" has occurred under the Landmarks Law. (438 U.S. at

124). The New York courts have applied those standards to the property of a religious organization and held that:

> because charitable organizations are not created for financial return in the same sense as private businesses, for them the standard is refined to permit the landmark designation restriction only so long as it does not physically or financially prevent or seriously interfere with the carrying out of the charitable purpose."

Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 454-55, 434 N.Y.S.2d 932, 935 (1980) (emphasis added)

Applying the same standard enunciated in Penn Central and applied in Ethical Culture, the District Court held that petitioner had failed to establish a taking by failing to prove that the landmark designation interfered with the primary use of the property as a house of worship and as a base for its activities. The Court of Appeals affirmed on

the law and the facts.

The Church is not a commercial owner and its community house was not erected to provide income. The District Court and Court of Appeals properly applied the standard enunciated in Penn Central and held that since the use of its buildings for its present activities is viable, there was no taking.

The petitioner's contention that a "taking" has occurred because it has been "denied the ability to exploit a property interest [it] heretofore had believed was available for development is quite simply untenable." Penn Central, 438 U.S. at 130. The lost income from a commercial real estate venture seeking the highest and best use of its property does not constitute an unconstitutional taking.

CONCLUSION

For the reasons stated, it is respectfully requested that the petition for certiorari of the Church be denied.

Respectfully submitted,

GERALD D. FISCHER
Attorney for Amici Curiae The Committee to Oppose the Sale of St. Bartholomew's Church Inc., J. Sinclair Armstrong, Robert E. Morris, Jr., Doris Capp Stass, George H. Weiler III, Madeleine Calder, Beatrice Lotz, Bromwell Ault, Jr., Neal Goldman And Charlotte Pierce Armstrong
275 Madison Avenue
New York, New York 10016
(212) 689-1131

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